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IN THE
Supreme Court of the United States

October Term, 1946

No. 299

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*
FRANK PALUMBO,

Petitioner,

against

J. VERNEL JACKSON, as Warden of Clinton Prison at
Dannemora, New York,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

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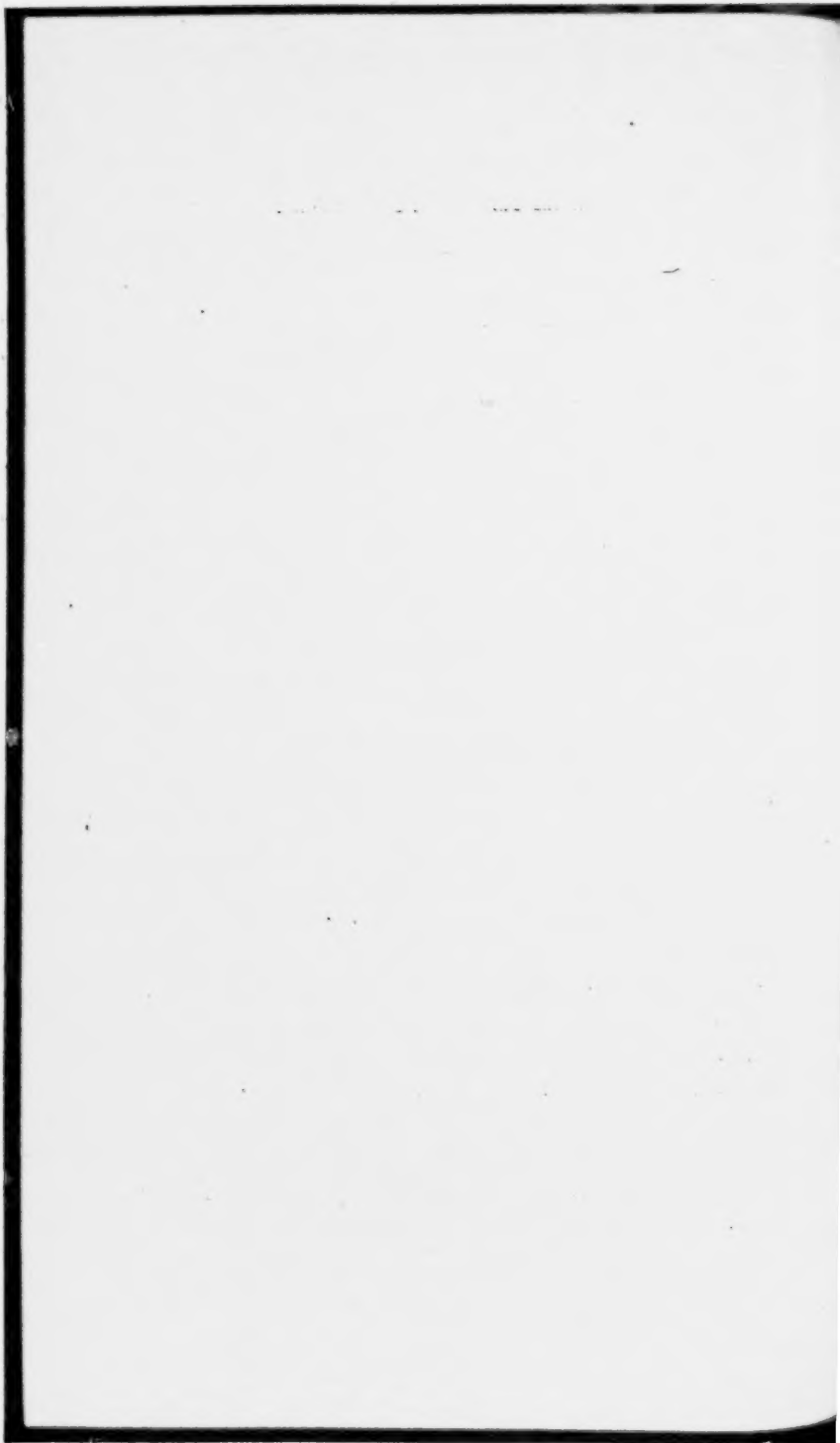


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**BRIEF IN OPPOSITION TO PETITION FOR
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Statement of the Case

Petitioner prays for a writ of certiorari to review a decision of the Court of Appeals of the State of New York handed down on March 29, 1946 affirming unanimously the order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, which

in turn affirmed an order of the Clinton County Court dismissing a writ of habeas corpus and remanding the petitioner to the custody of the Warden of Clinton Prison at Dannemora, New York.

The memorandum decision of the Appellate Division in which Justices Heffernan, Brewster, Foster and Lawrence concurred and Presiding Justice Hill dissented is reported in 269 App. Div. (N. Y.) 712.

Petitioner has failed to serve copy of the record upon the Attorney-General and in consequence we are unable to refer thereto. Inasmuch as the minutes of sentence under dates of May 14 and May 28, 1941 are of importance, we are appending these minutes certified by F. Howard Barrett, Clerk of the Court of General Sessions for New York County, to this brief, marking the same "Appendix A".

The Facts

On April 2, 1941, petitioner was arrested in New York County and was thereafter indicted by the Grand Jury of that County for the crimes of robbery, first degree; assault, second degree and carrying a dangerous weapon after prior conviction. When arraigned on April 24, 1941, he pleaded not guilty. However, on the trial date, April 30, 1941, he changed his plea to guilty of the crime of robbery, third degree. At this time and upon his appearance for sentence on May 14, 1941 before Hon. John J. Sullivan, a Judge of the Court of General Sessions of New York County, he was represented by Clyde Dart, Esq. of the Voluntary Defenders' Committee. The prisoner expressed his displeasure with the attorney assigned, whereupon the court assigned Patrick F. Dempsey, Esq., and adjourned

pronouncement of sentence. When he next appeared before the court on May 28, 1941, his new attorney Mr. Dempsey moved that the plea of guilty be withdrawn and that the prisoner be permitted to stand trial. The court considered the motion very carefully and after due deliberation, denied the application. The District Attorney of New York County then charged the prisoner with being a second felony offender; the information charging prior felonies was read to the prisoner and he was duly advised of his rights. Upon his admission that he was the same person mentioned in the information, the court imposed a sentence of not less than ten (10) nor more than twenty (20) years (second felony conviction).

No appeal was taken from the judgment of conviction or from the order denying the motion for leave to withdraw the plea of guilty.

The petition is based upon the claim that the petitioner was not accorded due process of law.

POINT I

Certiorari should not be issued to review the proceedings in the state courts upon a writ of habeas corpus, which is a collateral attack upon the judgment of conviction.

Petitioner is seeking to review the dismissal of a writ of habeas corpus on the theory that the trial court erred in refusing to grant his motion to withdraw his plea of guilty. If the court erred, corrective process was available to cure such an error. Petitioner might have appealed from the judgment of conviction and raised the issue, or he could have moved before the Court of General Sessions of New York County to vacate the judgment.

There is no allegation that the Court of General Sessions was without jurisdiction of the petitioner and of the offenses of which he was charged and such jurisdiction must be acknowledged and conceded (*People ex rel. Scharf v. Frost*, 116 N. Y. Supp. 946, aff'd, 135 App. Div. (N. Y.) 473, aff'd, 198 N. Y. 110). It was, therefore, competent to pronounce judgment. Its judgment cannot now be set aside more than five (5) years later by another court without appellate jurisdiction and by way of habeas corpus, regardless of petitioner's contention that his constitutional rights were invaded, or of any proof in support thereof, in view of the fact that the petitioner failed to avail himself of other and appropriate process (*Matter of Morhous, etc. v. Supreme Court of New York, et al.*, 293 N. Y. 131; *People ex rel. Martine v. Hunt*, 294 N. Y. 651).

Errors constituting denial of due process of law may be corrected in the State of New York upon application to the court of original jurisdiction to open and review its proceedings, even after the time for appeal has expired (*Matter of Lyons v. Goldstein*, 290 N. Y. 19; *Matter of Morhous, etc. v. Supreme Court of New York, et al.*, 293 N. Y. 131).

Our appellate courts in a long line of cases have consistently held that the trial court may deny permission to withdraw a plea of guilty and to substitute a plea of not guilty (*People v. Gormley*, 222 App. Div. (N. Y.) 256, aff'd, 248 N. Y. 583; *People v. Daiboch*, 265 N. Y. 125; *People ex rel. DeBaum v. Webster*, 267 App. Div. (N. Y.) 851; *People v. Westlake*, 268 App. Div. (N. Y.) 908; *People v. Gersewitz*, 294 N. Y. 163).

CONCLUSION

This cause presents no question warranting review by this Court and the petition should be denied.

Dated : September 10, 1946.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN,
Attorney-General of the State
of New York,
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The Capitol,
Albany, New York.

WENDELL P. BROWN,
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PATRICK H. CLUNE,
GEORGE A. RADZ,
Assistant Attorneys-General,
of Counsel.

APPENDIX A

Indictment No. 227277.

COURT OF GENERAL SESSIONS OF THE
COUNTY OF NEW YORK, PART III.

<p>THE PEOPLE, against FRANK PALUMBO.</p>

Before:
Hon. John J. Sullivan, J.
Sentence

Indicted for Robbery in the First Degree, Assault in the Second Degree, and Carrying a Dangerous Weapon after a prior conviction.

Indictment filed April 10, 1941.

In Part II, April 30, 1941, the defendant pleaded guilty to robbery in the third degree.

New York, May 14, 1941.

Appearances:

For the People: Assistant District Attorney Rogers.

For the Defendant: Voluntary Defenders' Committee,
by Clyde Dart, Esq.

(The defendant was duly arraigned.)

The Clerk: What have you now to say why judgment of the Court should not be pronounced against you according to law?

The Court: Palumbo, I have received a letter from you wherein you said you were not getting the proper attention from the counsel who was assigned to you, is that correct?

The Defendant: That's right, your Honor.

The Court: Well, I spoke to the lawyer who was assigned to you, and I am perfectly satisfied that he did everything

on the face of this earth which any individual could do for you. I don't know what he could do for you, Palumbo, there is nothing in your case which any other lawyer could tell you anything differently or advise you any way differently than what this man has done. It does not necessitate you writing letters condemning him. You have got a very stiff penalty staring you in the face, you know that, it is mandatory, there is nothing can stop it, but if you wish me to withdraw counsel and assign other counsel to you I will do it for you.

The Defendant: I do, your Honor.

The Court: I think you are only prolonging your own mental anguish around here in so doing, but in order that justice may be properly served and that you will be satisfied and I will be satisfied myself, that you had every opportunity to protect yourself, I am going to ask the Legal Aid to withdraw from this case and Mr. Dempsey, may I ask you to take this young man in charge.

Mr. Dempsey: Yes, Judge.

The Court: See what can be done. If he wishes to withdraw his plea and go to trial, that will be all right with me, he may do so, but that will be on the advices which you give him and what your conversations will be with me as a result of discussing the matter with him. You may look at the papers, they will be here, and you may look at the records that are here; you may read everything which is in conjunction with that case. Sentence is adjourned for one week.

REGINALD C. MERSHON,
Official Stenographer.

Ind. No. 227,277

COURT OF GENERAL SESSIONS OF
THE COUNTY OF NEW YORK, PART III.

THE PEOPLE,
against
FRANK PALUMBO.

Before:
Hon. John J. Sullivan, J.
Sentence.

Indictment for Robbery in the First Degree, Assault in the Second Degree, and Carrying a Dangerous Weapon after a prior conviction.

Indictment filed April 10, 1941.

In Part II, April 30th, 1941, the defendant pleaded guilty to robbery in the third degree.

New York, May 28, 1941.

Appearances:

For the People: Assistant District Attorney Walsh.

For the Defendant: Patrick F. Dempsey, Esq.

(The defendant was duly arraigned.)

Mr. Dempsey: I have an application to make, if your Honor please, and I think it is proper to make it before the Information is read, unless your Honor feels that it ought to be made after the Information.

The Court: I will entertain any application you have.

Mr. Dempsey: About ten days or two weeks ago, your Honor, you appointed me to represent this defendant, and at that time your Honor explained the circumstances under which I was being appointed to represent this man. The Voluntary Defendants of the Legal Aid Society had previously represented him, and he had some difficulties with that office.

Now I was then appointed to represent this man. He has pleaded guilty to robbery in the third degree, and he is a second offender. I had a couple of talks with this man in what is known as the bullpen in the rear, and I went over to the Tombs and I saw him on at least two or three occasions. He states at this time although he did plead guilty to robbery in the third degree that he was very much intoxicated at the time of the commission of this offense. At no time did he have any criminal intent to commit any kind of offense against the proprietor of this particular store, that he was overjoyed at the time of receiving a job back with the WPA, and he had been in the hospital for about three months prior, that he sought a job through his foreman up at Crotona Parkway in the Bronx section of the City of New York, and they sent him over to the WPA at 62nd St. & Columbus Ave.

At that place they gave him a blank to be filled out by the hospital authorities at Bellevue Hospital where he had been for three or four months. It was necessary to get an authorization from the hospital that he was all right, and then returned to the WPA. Thereafter he got intoxicated and he had been drinking all that day, and he got himself into this difficulty.

Now he has pleaded guilty to robbery in the third degree. He is a second offender. The defendant at this time has talked with me and he makes an application at this time to your Honor for permission to withdraw his plea of guilty to robbery in the third degree, and permit him to stand trial on this particular indictment.

The Court: I have been extremely patient with this defendant. I found myself in a most perplexing situation. The lawyers for the Legal Aid Society in my opinion did everything possible to protect his interest and gave him good and proper advice. However, I still felt that if he wanted to

withdraw that plea I would probably permit him to do it. We then put it off from week to week. Finally the Legal Aid asked to withdraw from the case, and I asked you to come in, which you very courteously assented to do. Now since that time, Palumbo, I have gone over your case back and forth, and back and forth. If I could see any benefit that you could get from a trial here I would permit you to withdraw that plea, but nobody knows better than you that it will be to no avail.

It is unfortunate that you drink to excess. Had this been your first offense and you were drunk at the time some leniency could be extended to you, but in view of your past record, your act here was merely a repetition of what has gone on before, drunk or sober. I can see no benefit that you can get or that the People can get or society can get by letting you withdraw this plea and going to trial, and accordingly the application is denied.

Mr. Dempsey: May I have an exception, if your Honor please?

The Clerk: Frank Palumbo, the District Attorney of the County of New York has filed an Information in which he accuses you of the following previous convictions of crimes which if committed within this State would be felonies. The allegation in the Information is as follows: that said defendant on or about the 8th day of April, 1919, in the Court of General Sessions of the Peace held in and for the County of New York, before the Hon. Otto A. Rosalsky, a Judge of said Court, was duly by law convicted of the crime of robbery in the third degree, and on the 16th day of April, 1919, the said defendant was sentenced for this crime to State's Prison for a term of not less than five years nor more than ten years; further, that said defendant on or about the 31st day of January, 1927, in the United States District Court, Southern District of New York, before the

Hon. Francis A. Winslow, District Judge, was duly by law convicted of the crime of selling a narcotic drug, whereupon the said defendant was sentenced for this crime to a United States Penitentiary for a term of three years and six months.

Now, Frank Palumbo, you are required to say whether you are the same person as charged in this Information or not. You may acknowledge in open court that you are the same person or you may say that you are not the same person, or you may refuse to answer, or you may remain silent. If you deny you are the same person mentioned in this Information or refuse to answer or remain silent, then a jury shall be empaneled to inquire whether you are the same person mentioned in the record set forth in the Information.

Frank Palumbo, after having been informed of your rights, are you the same person mentioned in the record set forth in this Information?

The Defendant: Yes.

The Clerk: The defendant admits his prior conviction.

What have you now to say why judgment should not be pronounced against you according to law?

Mr. Dempsey: Well, practically everything I said before might be reiterated here after reading the Information. I know there is nothing your Honor can do, it is a mandatory sentence which must be imposed.

The Court: Yes, I have nothing further to say, Palumbo, to you. We have discussed it with you time and time again, you know the crime and you know the gravity of the offense.

The sentence of this Court is that you be confined to State's Prison for a term the minimum of which shall be ten years and the maximum shall be twenty years. That is all.

REGINALD C. MERSHON,
Official Stenographer.

Form 72.

COURT OF GENERAL SESSIONS
OF THE COUNTY OF NEW YORK.

May 18, 1945.

I CERTIFY that the annexed is a copy of minutes of sentence now on file in the Clerk's Office, and that the same has been compared by me with the original and is a correct transcript therefrom, and of the whole of said original.

(Seal)

F. HOWARD BARRETT,
Clerk of Court.

